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Substantive Law Aspects of Enforcement of Foreign Judgments Between Foreigners in France: The Competence Question

Clearly one of the most troublesome problems in the French law of enforcement of foreign judgments is determining precisely the content of the condition of enforcement, laid down by the *Cour de Cassation* in the landmark case, *Munzer v. Dame Jacoby-Munzer,*[1] that the foreign tribunal was competent. The complexity of the issue may be increased in the case of an attempt to enforce a foreign judgment between foreigners in which there are no contacts with France on the merits.

When the French court in such a case takes the position that the test is whether the foreign court was competent according to French rules for the attribution of international competence, the party seeking enforcement is essentially in the position of having to show that if the events giving rise to the litigation had taken place in France rather than in the country rendering the foreign judgment, the French courts would have been competent. Obviously application of such a standard greatly restricts possibilities for enforcement when the foreign law is considerably more developed and actions giving rise to liability are more clearly defined than in French law. Such is the relationship, for example, between United States and French law of securities regulation. A hypothetical problem will illustrate the difficulty.

I. Hypothetical Problem

Boîte, S.A. (hereinafter Boîte), a Belgian corporation with *siege social* (principal office) in Brussels and assets worth $100 million, negotiated and

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[1] 91 J. DR. INT'L 302 (1964) (Cass. civ. Ire). The court enumerated five conditions for enforcement of foreign judgments: "the competence of the foreign tribunal which rendered the decision, the regularity of the procedure followed in the proceeding, the application of the competent law following French conflicts rules, conformity to international *ordre public* (public policy) and absence of all fraud on the court." *Id.* at 303-04.

contracted with Can Co., Inc. (hereinafter Canco), a New York corporation registered under Section 12(g) of the Securities Exchange Act of 1934, for the purchase of all of Canco's assets valued at $25 million solely in exchange for Boîte common stock. By a provision of the contract, New York law applied. Boîte filed the forms required under the United States securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934, and mailed prospectuses to all Canco shareholders from New York. Subsequently, Canco's shareholders approved the sale and Boîte presented the stock for acceptance in New York pursuant to the contract. Canco accepted the Boîte shares, distributed them to its shareholders and dissolved.

S, a Canadian national domiciled in Montreal and a former Canco shareholder, received 2,000 Boîte shares valued at $200,000 ($100 per share) at the time of the exchange. Three days later a Belgian court handed down a judgment for one billion Belgian francs ($25 million) against Boîte and Boîte's stock fell to $10 per share, at which level it has been ever since. S sued Boîte in the United States District Court for the Southern District of New York under Rule 10b-5 of the Securities Exchange Act of 1934, alleging material omission for Boîte's failure to disclose the litigation which had been pending at the time of the registration.

Boîte's corporate directors were served personally at the corporate headquarters in Brussels pursuant to Section 27 of the 1934 Act. Boîte failed to appear and the court rendered a default judgment of $180,000 against Boîte. S seeks advice on enforcement of the judgment against Boîte's deposit account at the Banque Nationale de Paris in Paris (hereafter "BNP"). Specifically, he wants to know whether he can have provisional relief in France on the basis of the American judgment and if a French court will regard the United States court sitting in New York as having been competent for the purpose of obtaining an *exequatur.* (enforcement judgment).

II. Summary Conclusions: Saisie-Arrêt and Exequatur

Although provisional relief in the form of *saisie-arrêt* is available to S, and the French courts would be competent to hear the action for enforcement, it is not clear whether the foreign judgment would be enforced, the potential objection being lack of competence of the United States District Court in New York.

A. *Saisie-Arrêt*

Saisie-arrêt (garnishment) is "the procedure by which the creditor attaches, in the hands of a third party, funds or movable property which the third party owes to the creditor's debtor, and objects to the return thereof."[2] According to

[2]L. CRÉMIEU, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET VOIES D'EXÉCUTION § 159 (1956).

Article 557 of the Code of Civil Procedure, the *saisie-arrêt* remedy is available to all creditors. S, being a judgment creditor of Boîte, is qualified to seek an attachment within the broad statutory framework. Just as there is a creditor-debtor relationship between S and Boîte, it also exists between Boîte and the BNP, by virtue of BNP's holding Boîte's funds on deposit.[3] Despite the fact that the real parties in interest, S and Boîte, are foreigners, the French courts are competent.[4] Finally, it is a well established rule now confirmed by the *Cour de Cassation* in *Selzner,*[5] that a foreign judgment without *exequatur* is sufficient documentary evidence to obtain provisional relief without court order.

Thus, S should be able to utilize the *saisie-arrêt* procedure even though this is essentially a dispute between foreigners with no relation to France other than the fact that the debtor Boîte has a deposit account at the BNP in Paris. At a minimum S should get the protection of having the fund frozen while he seeks an *exequatur* in France. If all goes well, including the *exequatur* proceeding, S can also utilize the execution phase of *saisie-arrêt* to compel payment by the BNP. In short, *saisie-arrêt,* although admittedly cumbersome and somewhat unsettled by the Code's failure to address itself to the situation of attachment between foreigners, thereby necessitating recourse to sparse case law and treatises, satisfies the plaintiff's needs.

B. *Exequatur*

The French courts are competent in *exequatur* cases between foreigners "when the enforcing judgment must necessarily produce its effects in France . . .,"[6] a condition fulfilled in the hypothetical case by offering proof of Boîte's deposit account at the BNP. As for the question of internal or special competence, it is the civil court, more precisely, the *tribunal de grande instance* at Paris, which is competent.[7]

In *Munzer,* the *Cour de Cassation* listed competence of the foreign tribunal as the first requirement for enforcement of a foreign judgment, but the court has never declared what the test of competence should be. Thus, the lower courts are free to formulate an appropriate test. The hypothetical case, moreover, presents a situation in which the French court might well want to apply a restrictive test in view of the rather extraordinary scope of United States securities laws in comparison with those of France.

The essential point in dispute is whether the French court, confronted with a request to enforce a foreign judgment, should determine the foreign tribunal's

[3]*See* P. CUCHE & J. VINCENT, VOIES D'EXÉCUTION ET PROCÉDURES DE DISTRIBUTION § 121 (9th ed. 1966); M. LABORDE-LACOSTE, EXPOSÉ MÉTHODIQUE DES VOIES D'EXÉCUTION § 312 (1952).

[4]*See* 4 E. GARSONNET & CEZAR-BRU, TRAITÉ THÉORIQUE ET PRACTIQUE DE PROCÉDURE CIVILE ET COMMERCIALE §§ 169 n.3, 473 (3d ed. 1913).

[5]Selzner v. Sanchez, 96 J. DR. INT'L 674 (1969).

[6]Dame veuve Ghan v. Orloff, 1928 D.P. II. 49 (Trib. civ. de Seine-et-Marne).

[7]2 H. BATIFFOL, DROIT INTERNATIONAL PRIVÉ § 741 (5th ed. 1971).

international competence under French rules of competence or under the law of the country in which the tribunal sits. Bartin adopted the first view.

In his formulation of the text, "the French court will consider the foreign court generally competent, if the facts grounding the foreign court's court's competence, which, by hypothesis, occurred in the foreign country, would have conferred, if they had occurred in France, competence on the French court."[8] Significantly, the French courts applied the Bartin analysis in every commercial case before the *Munzer* decision in 1964. The modern view, on the other hand, is to apply the rules of competence of the country in which the rendering court sits. Significantly fewer pre-*Munzer* cases took this approach, and all those doing so involved requests for enforcement of foreign judgments relating to personal status.

III. Recent Cases on International Competence

Post-*Munzer* case law has only brought more confusion. *Gunzburg v. Dame Schrey*[9] involved a request for *exequatur* for a Mexican divorce judgment between Schrey, a former French national naturalized as a United States citizen, and Gunzburg, a dual national of France and the United States. The general competence of the French courts, however, had been waived by the parties' voluntary submission to the jurisdiction of the Mexican court.

On the international competence question the Paris *Cour d'Appel* stated that, while "the French court cannot regain competence over the divorce action, it does not thereby surrender (contrary to the appellant's contention) the determination of the international competence of the forum court in which suit is filed, but retains in this area of competence an authority following the principles established under French private international law. . . ."[10] The court's decision was to deny *exequatur* on three alternate grounds: lack of international competence of the Mexican court; failure to apply the proper choice of law under French conflicts rules; and fraud on the court (abuse of process).

Déprez in a case note on *Gunzburg* observes that "the decision opts for the most strict solution . . ., a formula which, certainly, does not return unconditionally to French municipal rules of competence, but which signifies that it is necessary to search in the matter 'for the existence of a connecting factor of the kind positively justifying the international competence of the foreign jurisdiction,' this factor being domicile."[11] Bredin in another case note concludes: "One cannot thus say that the Paris Court . . . submits to firmly

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[8] 1 E. BARTIN, PRINCIPLES DE DROIT INTERNATIONAL PRIVÉ § 208 (1930).
[9] 91 J. DR. INT'L 810 (1964) (Cour d'appel, Paris).
[10] *Id.* at 811.
[11] 56 R.C.D.I.P. 340, 350 (1967).

established case law. The discussion, which the supreme court has not settled, remains open."[12]

Having opted for "the most strict solution" in *Gunzburg,* the Paris *Cour d'Appel* adhered to its position in a recent case, *Dame Tourasse v. Langevin,*[13] involving an attempt to enforce an Algerian divorce judgment. Langevin asserted that Mrs. Tourasse had waived her Civil Code Article 14 privilege of suing in a French court by her failure to seek final review of the original Algerian judgment overruling her plea to jurisdiction and her having then litigated the matter on the merits before the rendering court.

The court held, however, that "while Mrs. Tourasse could waive the privilege accorded to French nationals by Article 14 of the Civil Code, such a waiver is without effect insofar as it concerns the application of French rules of private international law designating the foreign court internationally competent to hear litigation in a matter involving French public policy . . ."[14] Thus, the court found no waiver of the right to renew the jurisdictional plea in opposition to an application for *exequatur,* because French rules for the attribution of international competence were a matter of French public policy under the circumstances. The court applied the French rule—competence of the court of the marital domicile—found said domicile to have been in Algeria and affirmed the judgment of enforcement.

In *Dame Tourasse* the Paris *Cour d'Appel* took the position that the French defendant in a foreign divorce proceeding cannot by waiver of Article 14 rights preclude the French court presented with a request for enforcement from applying French rules in international competence, notably the rule of the marital domicile. The same court, however, has indicated that failure to bring a divorce action at the marital domicile does not violate international public policy when the proceedings are between foreigners. In 1958 the court in *Lundwall v. Dame Villada y Sanchez*[15] looked only to Cuban law in enforcing a Cuban divorce judgment despite the fact that it was "not contested that the conjugal domicile, which, immediately after the marriage was established at Salzburg in Austria was still there when Mme. Villeda y Sanchez, who had gone back to her family in Cuba filed a petition for divorce in the Court of Almendares. . . ."[16]

This recent tendency to apply French rules of international competence in personal status cases has been complemented by an extraordinary decision in a commercial case, *Sociétés Mack Worldwide et Mack Trucks v. Compagnie*

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[12] 91 J. DR. INT'L at 816.
[13] 60 R.C.D.I.P. 541 (1971) (Paris Cour d'appel, Ire ch. suppl.).
[14] *Id.* at 542.
[15] 85 J. DR. INT'L 1016 (1958) Paris Cour d'appel, Ire ch. suppl.).
[16] *Id.* at 1019.

Financiére Pour le Commerce Extérieur (COFICOMEX),[17] applying foreign rules of competence to enforce a Swiss judgment in favor of a Swiss plaintiff against an American defendant. The Paris *Cour d'Appel* rejected the American corporation's plea for application of French rules of international competence. The court stated:

> Whereas it is true that international competence is determined by extension of rules of internal territorial competence when it is a question, for a French court, of ruling on its own competence in litigation filed therein in the first instance, it is fitting on the other hand, for the judge charged with ruling on a request for *exequatur*, to determine the international competence of the foreign court by applying more liberal principles of private French international law in this domain, which arise from custom as well as the statutory provisions; indeed a foreign court could hardly be required, under penalty of refusal to give *exequatur* to its decision, to apply such provisions of the municipal law of another country; whenever the French rule for resolution of conflicts of jurisdiction does not assign exclusive competence to the French courts, it suffices, for a foreign court to be recognized as competent, that the litigation be connected in a sufficient manner to the country in whose court suit was filed, that is to say that the choice of courts is neither arbitrary, nor artificial, nor fraudulent. . . .[18]

The court proceeded to note the contacts between Switzerland and the litigation, observing that Coficomex had its *siège* at Geneva where it carried various activities, and that the contractual offers in question had been accepted at Geneva. Thus, the court found that "the domicile of one of the parties and the place of conclusion of the contracts litigated being in Switzerland, the choice of the Geneva court is justified by the existence of a sufficient contact between the litigation and the country of the court seized. . . ."[19] As Huet observes in a case note, this is truly "a revolutionary decision,"[20] clearly contrary to past practice in commercial cases.

Returning to our hypothetical case, *Sociétés Mack* is an encouraging case for S. But it must be recognized that the factor of domicile of the plaintiff, an element very significant in the United States, in particular, New York, conflicts of law cases as well,[21] is lacking in the hypothetical case, S being a Canadian national and domiciliary of Montreal. Thus, S must be advised that the competence of the United States court from the standpoint of French law is by no means certain. Under the facts of the hypothetical case, one would have to be prepared to prove competence under French rules of international competence. In the case of litigation between foreigners this essentially means showing that if the events giving rise to the litigation had taken place in France as opposed to the country where it was initiated, the French courts would have been competent.

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[17] 100 J. DR. INT'L 239 (1973)(Paris Cour d'appel, Ire ch.).
[18] *Id.* at 242.
[19] *Id.*
[20] *Id.* at 244.
[21] *See, e.g.*, Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973).

Of course in light of *Sociétés Mack* one would first want to argue the sufficient-contacts theory. If the court refused to adhere to the sufficient-contacts test, or if it adhered but found the contacts insufficient, there are at least three possible theories of French court competence in the case of a failure to disclose material information in a merger transaction case in the form of a sale of assets in exchange for stock between a foreign acquiring corporation and a French acquired corporation. The French securities laws may give rise to a cause of action. Article 420 of the Code of Civil Procedure might be invoked to confer jurisdiction on the French commercial courts if the dispute is one arising in connection with the execution and performance of a contract. Finally, it might be argued that the failure to disclose constituted fraud, giving rise to tort liability under Articles 1382-1384 of the Civil Code.

IV. Sufficient Contacts

Under the modern approach to the resolution of competence problems in connection with the enforcement of foreign judgments, the principal thrust has been to move away from strict application of the French rules of international competence toward a test more compatible with international public policy. Thus, recent writers like Niboyet[22] and Batiffol[23] have suggested measuring competence in accordance with the law of the country rendering the original decision. Application of such a standard coupled with the other *Munzer* requirements for enforcement, notably conformity to international public policy,[24] seems sufficient protection against ridiculous assertions of foreign court competence. The decision in *Sociétés Mack* represents the first time a French court has taken a more modern approach in a commercial case. In effect, the Paris *Cour d'Appel* in seeking to determine whether "the litigation is connected in a sufficient manner to the country whose court has been seized"[25] has taken a modified modern approach, not looking solely to either French or foreign law but in general to the sufficiency of contacts.

Overall, the contacts in *Sociétés Mack* were rather strong. The court observes that "'Coficomex' had its *siège* at Geneva, where it is listed on the commercial register, pays its taxes, conducts operations on premises of more than 400 square meters and carries out financial operations within the scope of its corporate purpose; that, on the other hand, the representation contracts were concluded at Geneva, since the offers of Mack Worldwide, contained in its letters of February 8 and October 20, 1964, addressed to 'Coficomex' at Geneva, had been accepted in that city by the representative of the company

[22]6 J.-P. NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANCAIS § 1952 (1950).
[23]2 H. BATIFFOL, *supra* note 7, at § 719.
[24]*See* note 1 *supra*.
[25]100 J. DR. INT'L at 242.

who signed one of the two copies of the letters. . . ."[26] Thus, the court could rely on domicile of the plaintiff and place of contracting as contacts.

Furthermore, the court indicates the Swiss court was competent even under French rules, namely Article 420 of the Code of Civil Procedure, providing for the competence of the court in the place where payment is made. While the agreements did not specify the place where payment was to be made, Coficomex received notice of a payment of $37,500 to its bank account in Switzerland and a check for $15,327.55 had been carried over to Coficomex's account. From these facts the court concludes "that the contracting parties were in accord, at least tacitly, for payments have taken place in Switzerland"[27]

On the whole it seems rather dubious that S could show sufficient interests between the United States and the litigation to satisfy the French court. As the following discussion indicates, the broad jurisdiction asserted by the courts in the United States in the name of securities regulation is virtually nonexistent in France. It is foreseeable that the French court would find the United States court's exercise of jurisdiction for the benefit of a Canadian national based on the transactions in New York too extraordinary to merit enforcement.

V. French Law of Securities Regulation

French law regulating transactions in securities remains primitive in comparison with United States law. Given this more relaxed French attitude toward the subject, it would be difficult to convince the French judge of the competence of the American court on the basis of sufficiency of contacts and impossible to establish that a similar cause of action would exist under the French regulatory scheme if the events complained of had taken place in France. Indeed, it is scarcely possible that a transaction such as that described in the hypothetical case could be effected in France.

With respect to the original six members of the European Community, Stein observes that international fusions (mergers) "between companies of different nationalities have been unknown thus far in all of the member states."[28] In France an international merger is lawful, but in the case of acquisition of a French company by a foreign company, the unanimous consent of the French company shareholders is required, a condition not easily fulfilled where shareholders are numerous and widespread.[29] A further impediment to international merger between companies under different legal systems was

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[26] *Id.*
[27] *Id.* at 243.
[28] E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 371 (1971).
[29] *Id.* at 383 n.177.

added by a 1968 decree[30] amending Article 306-2 of the 1967 Decree on Commercial Companies[31] which now provides:

> In the event of a proposed merger between companies only one of which is subject to the law of July 24, 1967 on commercial companies, the merger proposal may not be filed with the clerk of the commercial court nor may it be given the publicity referred to in Article 255 of this decree before the other company or companies are also subject to the above-mentioned law.

Putting aside the practical problems of effecting such a transaction in France, the French law on commercial companies does not provide for any disclosure *by the acquiring* company to the acquired company and its shareholders. The disclosure which is required is directed toward *informing the acquiring* company of the value of the acquired company. Apparently, the French have neglected the other side of the problem, *i.e.*, providing the acquired shareholders with sufficient, reliable information about the acquiring company.

The 1966 Law on Commercial Companies[32] provides for shareholder approval by both companies concerned.[33] The auditors of each company are required to submit a report on the terms of the merger, particularly on the payment for contributions of the surviving company.

The heart of disclosure is Article 254 of the 1967 Decree which provides:

> The plan of merger or split-up shall be drawn up by the board of directors, the directorate, or the managers, as the case may be, either of each of the companies involved in the merger or of the company whose split-up is proposed.
>
> The plan must contain the following particulars:
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> 1. The reasons, purposes, and terms of the merger or split-up;
> 2. The dates as of which the companies' financial statements used to establish the terms of the transactions were prepared;
> 3. A statement and valuation of the assets and liabilities, conveyance of which to the surviving or new companies is provided for;
> 4. The exchange ratios;
> 5. The expected value of the merger or split-up premium.
>
> The plan or a statement attached thereto shall describe the methods of valuation used and give the reasons for selection of the exchange ratios.

Thus, while valuation of the assets and liabilities of the acquired company is to be furnished to the acquiring company, no such information need flow in the other direction. Furthermore, the legislative history of the valuation provision suggests that the statement of assets and liabilities of the acquired company is only intended as an indication and not a definitive declaration of the actual

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[30]Decree No. 68-25 of Jan. 2, 1968, [1968] J.O. 524, C. Com. 976 (69e ed. Petits Codes Dalloz 1973).

[31]Decree No. 67-236 of Mar. 23, 1967, [1967] J.O. 2843, C. Com. 918.

[32]Law No. 66-537 of July 24, 1966, [1966] J.O. 6402, C. Com. 824.

[33]Art. 376.

financial condition. This interpretation arises from the fact that the 1967 text which provided "la designation et l'évaluation de l'actif et du passif qui seront transmis aux sociétés absorbantes ou nouvelles" was amended in 1968 to read "la designation et l'évaluation de l'actif et du passif dont la transmission aux sociétés absorbantes ou nouvelles est prevue."[34]

As required by Article 255, this valuation statement, the exchange ratio, a statement of the expected value of the merger and a few other formalities are to be published in a legal announcement. According to Article 256, the board of each company must furnish its auditors with the merger plan at least 45 days prior to the shareholders' meeting. Article 257 requires that the auditors' report be filed at the registered office of the company and made available to the shareholders for fifteen days preceding the shareholders meeting. No private cause of action for damages is given in connection with any of these requirements.

Beyond establishing the most general principle that merger transactions are subject to government regulation, the substantive French securities law affords little assistance in establishing that a French court would have been competent if Boîte had effected a merger with a French company without disclosure to that company's shareholders of the litigation pending against it.

VI. Article 420

Having found the French commercial law governing international mergers, and more particularly disclosure to the acquired corporation shareholders, to be of little utility in establishing a cause of action in France, one might consider constructing a cause of action under Article 420 of the Code of Civil Procedure. That article provides:

> The plaintiff may sue, at his choice, in the court of the domicile of the defendant; in the court of the place in which the promise was made and the merchandise delivered; or in the court of the place where payment was to be made.

Initially, the provision appears promising since under the facts of the hypothetical case, the merger transaction was negotiated and concluded in New York and the payment (stock) was delivered in New York. It is unlikely that the "merchandise" was actually "delivered" in New York since the assets of the acquired corporation consist of both real and personal property and are not entirely susceptible to transport but at a minimum they were put at Boîte's disposal and title passed in New York. In any case the last requirement of payment in the place where suit is brought seems sufficient to satisfy Article 420 since the provisions are not cumulative. Thus, if these events had taken place in France, arguably the French commercial court would have been competent.

[34]Baudeu & Bellargent, *Fusion de sociétés*, VI bis JURIS-CLASSEUR DES SOCIÉTÉS, pt. 184C, §§ 17, 31

Article 420 is a useful provision, as the French courts have frequently referred to it as a measure of the international competence of a foreign tribunal, especially in commercial cases arising under the Franco-Sardinian Convention of March 24, 1760 and an interpretative Declaration of September 11, 1860.[35] The typical case, however, involves the sale of goods for money, the *Cour de Cassation* having specifically denied the applicability of Article 420 in a case arising from a dispute over an employment contract.[36] The approach has never been taken in a merger case.

Text writers and the courts have a tendency to state a general rule that Article 420 is applicable in all cases involving commercial contracts with the exception of insurance contract cases which are governed by special statute.[37] The general rule, however, may be misleading. Cuche and Vincent note:

> But it is not necessary to go further and say that the exceptional competence of Article 420 is applicable in all commercial litigation, even from litigation arising from willful or negligent torts or quasi-contracts of a commercial nature.
>
> It is necessary to return, for all litigation of this nature, to the competence of the court of the defendant's domicile; it is the same when the existence of the agreement is seriously contested.[38]

Thus, it becomes important to distinguish whether or not the liability sought to be imposed actually derives from the contract. If the source of liability appears to be outside the contract, Article 420 is inapplicable. Reference to the cases is useful in understanding the limitation.

An early case limiting the scope of Article 420 was *Compagnie des Bateaux à Vapeur du Rhone les Aigles v. Silvestre.*[39] Plaintiff Silvestre sued the defendant steamship company for damage to his raft, alleged to have resulted from the defendant's negligent operation of its steamship, in the court in Avignon where the plaintiff alleged that the company's agent resided rather than the court of Lyons, the company's *siège social.* The trial court and the intermediate appellate court at Nîmes upheld the plaintiff's theory of competence.

The company appealed to the *Cour de Cassation,* asserting the incompetence of the court at Avignon on several grounds, one of them being the unavailability of Article 420.

Apparently, the defendant company's branch at Avignon had entered into an insurance contract there and paid its premiums there. Defendant argued that

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[35]Depretis v. Lowengard, 24 J. DR. INT'L 797 (1897) (Cour d'appel Lyon); Laura v. Hervé, 1909 D.P. II. 61. *See also* Shepherd's Bush Exhibition v. Véry, 44 J. DR. INT'L 1405 (1917) (Trib. civil de la Seine, Ire ch.) for a case involving enforcement of a British judgment. *Contra* Trésic v. Pompanon, 25 R.D.I.P. 288 (1930) (Cour de Paris), refusing to apply Article 420 as a rule of international competence.

[36]*See* text accompanying notes 40-41 *infra.*

[37]*See* P. CUCHE, *supra* note 3, at 294.

[38]*Id.*

[39][1858] D.P. I. 130 (Cass. civ.).

the making of such payments was not sufficient for plaintiff to invoke Article 420. In quashing the lower court decision, the *Cour de Cassation* necessarily concurred in the unavailability of Article 420. The case clearly establishes that Article 420 does not extend to purely personal and civil actions to enforce tort liability, not a surprising result since the plaintiff himself had no contact at all with the defendant.

In an 1862 decision, the *Cour de Cassation* in *Salvaja et Basso v. Compagnie d'Assurance La Confiance*[40] upheld a decision of the *Cour Impériale* of Paris refusing to enforce two default judgments of the commercial court of Genoa. The plaintiffs, domiciled in Genoa, were general agents of La Confiance, a fire insurance company with *siège* in Paris. The basis of their complaint was the company's action in discharging them. The court held that the employment contract in question did not come within Article 420, "since it is a question neither of sale nor of delivery, nor of payment for merchandise, but the carrying out of an agency coming within the general provisions of the law."[41]

In an 1880 case, *Claparède et Compagnie v. Compagnie de Remorquage de Calais,*[42] the *Cour de Cassation* further limited the scope of Article 420. In this case Remorquage had provided Claparède with a captain and mechanic to take Claparède's vessel from Saint-Denis to Calais. Remorquage, situated in Calais, sued Claparède, domiciled at Saint-Denis, for expenses and disbursements advanced. The suit was filed in the commercial court in Calais. The *Cour de Cassation* denied the competence of the Calais court under Article 420 "since the action of the Société de Remorquage derives from none of the grounds stated by this article, but from the performance either of an agency, or of a quasi-contract for management of affairs, which are covered by general provisions of law and cannot modify rules of competence."[43]

The most significant Article 420 case from the standpoint of the hypothetical case is *Compagnie des Tramways du Nord v. Vauverts.*[44] Plaintiff purchased a round trip ticket on the defendant tramway. She alleged that she was injured when the car in which she was riding was hit by another tram moving in the opposite direction. The appellate court held that the commercial court of Roubaix was not competent under Article 420 because the claim sought to be enforced arose from a tort and not a contract. The court states: [I]t is not doubted that the rules of exceptional competence of this article are not restricted to the case of sale or purchase of merchandise; that they apply still to all commercial litigation in which it is a question of a delivery as a payment to be made, more generally, that they apply to all obligations which arise naturally

[40][1862] S. Jur. I. 427 (Cass. req.).
[41]*Id.* at 429.
[42][1880] S. Jur. I. 263 (Cass. req.).
[43]*Id.*
[44][1898] D.P. II. 312 (Douai Cour d'appel, Ire ch.).

from an agreement. . . ."[45] This case clearly indicates that even though there is a contract, not every event or obligation occuring as a result of performance can be characterized as coming within Article 420. The same court reaffirmed its position in a later case, *Deltour v. Dame Cayez-Nivis*,[46] observing that Article 420 does not derogate from the general rules assigning jurisdiction to the court of the defendant's domicile except in case of a commercial obligation arising from a contract.

The *Dalloz Répertoire* summarizes the scope of Article 420:

> Article 420 applies exclusively in commercial matters, from which it follows that the indication of a place of payment in a civil matter is not attributive of jurisdiction. . . .
>
> Article 420 does not derogate from the general rules of competence except in case of commercial litigation arising from a contract. . . .
>
> But all disputes concerning either the interpretation or the preformance of the contract are subject to Article 420, whose provisions are applicable to every action which it concerns, even those filed after complete discharge of the respective obligations of the parties. . . .[47]

Thus, it becomes significant to distinguish between obligations which arise from the contract and those which do not. In the hypothetical problem it is clear that the contract itself did not expressly provide for disclosure and that such an obligation is not imposed by French securities law. As the next section will indicate, there is apparently no rule of French contract law that would imply a duty to disclose under the circumstances. Therefore, it seems quite possible that a French court would find that Article 420 is inapplicable because the obligation to disclose, if there is any at all, arises under a tort theory rather than contract.

VII. Duty to Disclose under Contract and Tort Principles

Even though French law governing mergers imposes no obligation on the acquiring company to provide a statement of its financial condition, there may be general principles of contract law imposing an obligation to disclose or principles of tort law making it fraudulent conduct not to disclose. First, it is important to distinguish between causes of action grounded in contract and those based on tort.

A. *Distinction Between Contract and Tort*

Analysis of whether the injury complained of sounds in contract or tort is necessary not only to determine the applicability of Article 420 but also to establish which principles of general law might be invoked.

Mazeaud and Tunc delineate these two areas of civil responsibility as follows:

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[45] *Id.*

[46] [1905] D.P. V. 3 (Douai Cour d'appel, lre ch.).

[47] DALLOZ RÉPERTOIRE DE PROCÉDURE CIVILE ET COMMERCIALE, *Competence Commerciale*, Nos. 146-148 (1955).

> The victim may claim in contract if he has entered into a valid contract with the one who caused the injury and if the prejudice complained of arises from the non-discharge of a principal or incidental obligation established by the contract, or if he can invoke a waranty given by the other contracting party. The causes of the contract may moreover, within certain limits, not only eliminate or limit the obligation (which is sometimes the case when there is no failure to perform the contract), but also eliminate or limit the warranty liability.
>
> In cases of contractual fault or warranty, the victim may not claim in tort, except in exceptional cases in which the same act which constitutes a contractual fault constitutes a tortious fault distinct and outside of the contract.
>
> Beyond these cases, on the other hand, the victim may initiate a tort action. He may nevertheless, within certain limits, have concluded with the one who caused the injury an agreement which deprives him of his recourse or limits its effects.[48]

Essentially, there is contractual liability when there is a valid contract and the injury complained of arises from the failure to discharge an obligation expressly stated or implied by law in the contract. Otherwise, the injury gives rise to noncontractual liability. Regardless of which realm of civil responsibility the injury falls within, the same three elements of liability must be established: damage, injury and the relationship of cause and effect between the fault and the damage.

B. *Contract*

Approaching the problem from the standpoint of contract law, one could best establish the competence of the French courts by asserting that the failure to disclose the pending litigation in Belgium constituted concealment (*réticence*) and fraud (*dol*) sufficient to vitiate the element of consent, thereby rendering a French court competent to declare the contract invalid and to award the plaintiff damages.

Article 1108 of the Civil Code establishes four conditions essential for the validity of a contract: consent of the party to be bound; his capacity to contract; a certain object as the basis of the engagement; and a legal cause in the obligation. According to Article 1109, there is no valid consent if the consent is given only by error or if it has been extracted by violence or obtained by *dol* (fraud).

Dol is the aspect of fraud relating only to fraud in connection with the execution of a contract. *Dol*, amounting to a civil wrong, is a basis for declaring the contract invalid and awarding the plaintiff damages. To establish *dol* one must show intentional fault imputable to the contracting party defendant. Fault may be established by showing fraudulent schemes or misstatements or concealment. Concealment (*réticence*) is the act of not speaking. It is voluntary silence intended to create or permit a determinable error. The majority view

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[48] 1 H. MAZEAUD, L. MAZEAUD '9 A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RÉSPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE § 207, at 258-59 (1965).

today is that there is concealment when one omits voluntarily something he was obligated to reveal.[49] The obligation to inform has been imposed by statute under certain circumstances including among others the seller's obligation on delivery to give the buyer all information indispensable and useful for the use of the thing sold as well as hidden defects and the insured's obligation imposed by statute to inform the insurer in connection with certain insurance contracts.[50]

In recent years the courts have found nullity for reason of fraudulent concealment in the absence of schemes or falsehoods. The difficult question, especially in the absence of these aggravating factors, is to determine when the obligation to speak arises. Ghestin has posed the question as follows:

> Is it necessary to consider an obligation exceptional, and thus, to be excluded in the absence of a formal text? Or can one conclude from these diverse texts, if not that a general obligation to inform exists, which does not correspond to generally followed practice, . . . at least that such an obligation could exist under certain circumstances. It is this middle approach which the cases have followed.[51]

Thus, if a specific statutory obligation can be found, there is no problem in imposing liability for failure to speak. But the courts have further been willing to impose liability under certain circumstances without statutory mandate. One must look to the case law to determine the scope of liability.

The courts have shown a tendency to find liability for concealment when it is a question of some confidential relationship, either because of the nature of the contract or the capacity of the other party. In the former category the *Cour de Cassation* found liability in a case involving formation of a company where one of the associates failed to reveal to the other that he was subject to a court order winding up his affairs and remained substantially indebted to his personal creditors.[52] Similarly, the court apparently found an obligation to inform faithfully one who is being solicited to join a company by application of Civil Code Article 1110.[53] With respect to capacity of the party, the *Cour de Cassation* annulled an appointment of a notary as heir where the notary had not told his 80-year-old client of the fact the appointment was irrevocable.[54]

Beyond these categories the *Cour de Cassation* has held a party liable for failure to speak under more general circumstances. In *Dame Haller v. Untrau*[55] the court upheld a decision annulling a contract for the sale of a truck when the

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[49]3 DALLOZ ENCYCLOPÉDIE JURIDIQUE—DROIT CIVIL, DOL § 25 (2d. ed. 1972).

[50]*Id.* at §§ 26-30; 1 P. LE TOURNEAU, LA RÉSPONSIBILITÉ CIVILE § 889, at 347 (1972).

[51]Ghestin, *La réticence, le dol et l'erreur sur les qualités substantielles*, [1971] D.S. Chr. 247, 248.

[52]Brunet v. Manière, [1959] Bull. Civ. III. 162.

[53]Decision of March 8, 1965 (commercial section), [1965] Bull. Civ. III. No. 173 *cited in* 3 DALLO, *supra* note 49, at § 28. The writer has not seen this case and is unable to relate the circumstances under which it arose.

[54]Consorts Deladouespe-Loyau v. Phebipeau, [1960] Bull. Civ. I. 198.

[55]Decision of May 19, 1958 (Civil Section) (1958 BULL. CIV. I. No. 251).

seller failed to reveal the existence of a lien. The court observed: "[T]he Cour d'appel was able to determine from the deliberate silence of Reichstädt as to a fact of which the buyers had no knowledge and which, if they had known it, would have caused them not to deal, the existence of a fraud."[56] Similarly, the court in *Maître Dadi v. Marie*[57] upheld an annulment of a contract for sale of a business where the seller failed to reveal that one of the essential assets of the business, a patent, had been assigned to a third party. The court observed that the presumed existence of the patent "had played a decisive role in the buyer's decision. . . ."[58] Finally, the court upheld the annulment of a contract for the sale of a business where the seller failed to reveal that an essential permit was about to expire and the government agency had no intent to renew it.[59]

Although the *Cour de Cassation* has been more willing to annul contracts because of silence under general circumstances not exhibiting any special confidential relations between the parties, it has also created defenses that formerly would have been available only when the ground for annulment was error rather than fraud. Thus, the court has refused annulment where the complaining party's lack of knowledge was inexcusable, observing that "concealment supposes that the silence of a contracting party relates to a circumstance or a fact that the other party could be excused for not knowing. . . ."[60] Likewise, the court has indicated that silence as to a fact that the parties did not consider essential to the conclusion of the contract is not sufficient to obtain annulment.[61] In a recent decision, *Époux Corgnet v. Époux Marie,*[62] however, the court backed away from the essential standard observing that while "fraud may result from the silence of a party, . . . the error caused by the fraud may be taken into consideration, even when it does not bear on the substance of the thing, since it gave rise to the consent of the other contracting party."[63]

Applying the case law to the facts of the hypothetical problem, one cannot give a definitive answer on the attitude of the French courts toward the failure of Boîte to reveal the pending litigation. The cases indicating liability of promoters for failure to inform fully those who initially subscribe for stock are useful in that the merger situation is somewhat analogous—it is a question of bringing in

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[56]*Id.*

[57][1959] Bull. Civ. III. 100.

[58]*Id.* at 101.

[59]Decision of October 27, 1965 (commercial section), [1965] Bull, Civ. III. No. 534 *cited in* 3 DALLOZ, *supra* note 49, at § 28. The text of the decision was not available to the writer but it is also discussed in Chevallier, *Obligations et contrats spéciaux,* 64 REVUE TRIMESTRIELLE DE DROIT CIVIL 529, 530 (1966).

[60]Époux Baroux v. Consorts Guernier, [1954] J.C.P. II. 8384 (Cass. soc.). *See also* Avocat v. Compagnie auxiliaire d'entreprise du livre "C.E.A.L." J. Delmas et Cie, [1962] Bull. Civ. IV. 276.

[61]Giron v. Consorts Rocher, [1953] Bull. Civ. I. 221.

[62][1967] Bull. Civ. I. 43.

[63]*Id.* at 43-44.

new shareholders. A notable difference in the merger situation, however, is that those who are being invited into the acquiring company are represented by their own entity, the acquired company, and are not in the position of having to deal directly with the acquirer. In short, the shareholders of the acquired company may not be viewed as needing as much protection as individual investors. It is encouraging that the *Cour de Cassation* does not tie liability to a showing of confidential relations between the parties, but if the defense of inexcusable error were permitted, it might well be argued and accepted that two corporations dealing on an arm's-length basis are obligated to investigate and should discover a matter so important as pending litigation for one quarter of the acquiring company's assets. Thus, while the case law on concealment is uncertain, there is a substantial possibility that a French court would be competent in a claim for fraud and concealment under the hypothetical facts.

C. *Noncontractual Liability (Tort)*

The basic provision of noncontractual liability is Article 1382 of the Civil Code which provides: "Every act whatever of man, which causes injury to another, obligates the one by whose fault the injury occurred, to repair it." Although Article 1382 does not specifically refer to fault by omission, it is well established in French law that omission is included.[64] Furthermore, the fact that Boîte is a corporation does not affect the applicability of 1382 since the word "man" is interpreted not only to include natural persons but also legal entities committing a fault giving rise to damage.[65]

Carbonnier distinguishes three kinds of fault by omission. There is omission in the act which is failure to act in connection with some broader activity initiated by the one who fails to act. *Carbonnier* cites as examples the automobile driver who having reached excessive speed fails to brake at the decisive moment and the worker who having made an excavation in a public way fails to mark it with a warning light at night.[66] As he describes it, this area of liability is negligence by omission.[67] The facts of the hypothetical case do not appear to give rise to this kind of liability although it is quite possible that the failure to disclose pending litigation under circumstances in which Boîte undertook to disclose contingent liabilities and neglected to mention the pending suit would create liability.

Next is failure to act while under a legal obligation to act; for example, the failure of an automobile driver to turn on his headlights after nightfall.[68] As has

[64] *See* 4 J. CARBONNIER, DROIT CIVIL § 93, at 330-31 (7th ed. 1972); 1 H. MAZEAUD, *supra* note 48, § 524, at 623.

[65] 2 H. MAZEAUD, L. MAZEAUD & J. MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RÉSPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE § 1986, at 1124 (6th ed. 1970).

[66] 4 J. CARBONNIER *supra* note 64, § 93, at 331.

[67] *Id.* at 330.

[68] *Id.* at 331.

already been seen, no specific French statute such as the law governing mergers and securities transactions and no general principle of French contract law imposes a legal obligation to act. Thus, this provision is not very useful.

Finally, there is failure to act in the absence of any legal obligation to act but with intention to injure.[69] *Carbonnier* observes that failure to act with intent to injure always constitutes fault but that in the absence of an intention to injure, the failure to act does not constitute fault except where an obligation to act is imposed by law, rules or regulations, even not written, of the trade. Establishing intention to injure under the hypothetical facts is difficult because the judgment had not been rendered at the time of the merger; the liability was only contingent. If additional facts were available indicating that Boîte's management felt that there was a strong possibility that the judgment would go against the company and that they sought the merger with the idea of increasing assets to absorb the impact of an unfavorable decision in the pending litigation, changes of establishing liability under French law would be enhanced. But in any case, the standard of intention to injure puts a rather difficult burden of proof on the plaintiff.

Since the judgment against Boîte was handed down just three days after the consummation of the merger, one could argue that Boîte management was motivated by fear of an unfavorable judgment. Thus, of the noncontractual theories of liability, omission in the act and omission with intention to injure are the most likely grounds of establishing French court competence, providing that additional facts could be established.

VIII. Conclusion

The object of this discussion, of course, is to determine whether the client S will be able to enforce his New York federal district court judgment in France. The hypothetical problem focuses on the question of whether the French enforcing court would find the New York court competent for the purpose of enforcement of its judgment in France. While it is possible that the French court would look only to United States law in determining the competence of the New York court, there is no statute compelling such a resolution of the issue. The case law is uncertain, there having been no definitive word from the *Cour de Cassation* on the question. Thus, S must be advised that he will have to be prepared to establish, under the older theory of foreign court competence in *exequatur* proceedings, that a French court would have been competent if the events complained of, which by hypothesis took place in New York, had taken place in France.

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[69] *Id.*

As the foregoing analysis has indicated, French substantive law does not clearly give a cause of action for the failure of an acquiring company in a merger transaction to inform the shareholders of the acquired company of pending litigation against the acquiring company. Such action is surely not compelled under French securities law. It also seems clear that it would be difficult to cast the obligation to disclose in the form of a contractual obligation such that a French court would have been competent under Article 420 of the Code of Civil Procedure. Undoubtedly, the most promising area of French law for the imposition of liability under the circumstances is the law of contract. Specifically, the favored theory is fraud or concealment preventing formation of a contract. French courts have imposed on the seller a duty to speak, even in arm's length transactions, but not in a merger case in particular. Given the fact that the French have not really recognized the disclosure ideal as the guiding light of securities regulation, one must be somewhat skeptical that the court would be anxious to protect the shareholder under the circumstances. Finally, a cause of action in tort for omission to act will be difficult as it appears the plaintiff would have the burden of proving defendant's intent to injure.

Most importantly, the hypothetical problem illustrates the broad discretion of the French court faced with a request to enforce a foreign judgment on a cause of action not clearly recognized under French law. The *Cour de Cassation* in *Munzer* abolished review on the merits in proceedings for enforcement of foreign judgments, but in a case like the hypothetical, it is apparent that the merits are still within reach of the court in the guise of the competence requirement.